

Wegmans Food Markets, Inc. and United Food and Commercial Workers District Union Local One, AFL-CIO. Case 3-CA-14730

December 11, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On May 11, 1990, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wegmans Food Markets, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² In affirming the judge's application of the balancing standards established in *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), and elaborated on in *Jean Country*, 291 NLRB 11 (1988), to assess the relative strength of the Sec. 7 rights underlying the Union's handbilling to inform the public that the Respondent is nonunion and to ask customers to shop at union stores, we find it unnecessary to consider whether the Union's concurrent distribution of a second union handbill that compared the Respondent's prices in Rochester with its prices elsewhere was protected by Sec. 7 of the Act because of that handbill's content and, thus, whether it does or does not provide an additional basis for finding a violation of Sec. 8(a)(1) of the Act. Furthermore, even assuming arguendo that the Union's distribution of the second handbill was not protected, we would find no merit in the Respondent's contention that the strength of the Union's Sec. 7 right to distribute the first handbill was so weakened as to warrant a conclusion that its right to distribute the first handbill did not outweigh the Respondent's property interest.

Ronald Scott, Esq. and Francis J. Novak, Esq., for the General Counsel.

Michael A. Hausknecht, Esq. (Nixon, Hargrave, Devans & Doyle), of Rochester, New York; *Gene L. Paley Esq. (Philips, Lytle, Hitchcock, Blaine & Huber)*, of Rochester, New York; and *Paul S. Speranza Jr., Esq.*, of Rochester, New York, for the Respondent.

Gene M. J. Szuflita, Esq. (Belson & Szuflita), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Rochester, New York, on October 18 and 19 and December 12, 1989. The complaint alleges that Respondent, in violation of Section 8(a)(1) of the Act, prohibited representatives of the Union from engaging in peaceful informational handbilling protected by the Act in front of Respondent's Ridgemont store and disparately applied its policy with respect to solicitation and distribution of literature at the store. Respondent denies that the Act protects the Union's right to engage in handbilling on Respondent's property, and denies that it applied its policy in a disparate manner.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with its principal office in Rochester, New York, is engaged in the operation of retail grocery stores throughout Western New York, including a retail store in Ridgemont Plaza, Greece, New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Ridgemont Plaza is a strip plaza located in Greece, New York, a suburb of the City of Rochester. The plaza runs along the south side of Ridge Road, a thoroughfare that is oriented in an east-west direction. Respondent owns the plaza and has the right to control the parking lot and the interior sidewalks. There is a sidewalk along Ridge Road, and between the sidewalk and the plaza there is a grassy strip on which trees and bushes are planted at intervals of several feet.¹

Three entrances give access to Ridgemont Plaza. Along the eastern edge of the plaza from the two-lane road that intersects Ridge Road, an opening that exceeds the width of three car lanes permits cars to drive into the plaza. This opening is not marked with paint stripes or barriers of any kind; the evidence shows that cars entering or exiting the plaza drive through this opening at any point and without encountering any traffic signal.² Another entrance to the plaza is located on Ridge Road toward the eastern end of the plaza and the third entrance is on Ridge Road toward the western end of the plaza. Both of these openings are the width of four lanes of traffic; two lanes of each opening are marked for entrance to the plaza from Ridge Road and two lanes are marked for exit from the plaza to Ridge Road. The opposite lanes in each opening are divided by a concrete median

¹ The sidewalk is a public right of way.

² One witness thought there might be a stop sign for exiting cars, but he could not be certain.

about 4-feet wide and raised about 5 inches above the surface of the roadway. The medians extend about 100 yards into the plaza.

The speed limit on Ridge Road is 40 miles per hour. The road has four lanes of traffic; two lanes are eastbound and two lanes are westbound. Cars traveling along Ridge Road in an easterly direction enter Ridgemont Plaza by turning right directly from the lanes of traffic without benefit of a turn lane. Cars traveling west along Ridge Road use a central turn lane controlled by a traffic signal in order to make the left turn into Ridgemont Plaza.

Ridgemont Plaza contains about 29 stores in a strip arrangement. In addition to owning the plaza itself, Respondent owns and operates a Wegmans supermarket which is the easternmost store in the plaza. The supermarket is the second or third largest store in the plaza.³ All the stores in the strip have their own entrances directly from the plaza. The parking area for the plaza is not delineated nor reserved for the use of any of the stores in particular. Thus, cars may be parked anywhere in the plaza and their occupants may patronize any of the 29 stores in the plaza. Similarly, the three entrances to the plaza do not indicate that any one of them is reserved for the use of patrons of a particular store. Respondent's security personnel are aware that cars enter the parking lot using the entrance nearest its supermarket and then drive across the lot directly to other stores. There is very little pedestrian traffic into the plaza; most customers drive in and park their cars in the plaza.

Wegmans supermarket stands directly facing the eastern four lane median-divided entrance to the plaza from Ridge Road. The witnesses who testified concerning the matter all agreed that the entrance on Ridge Road is from 500 to 600 feet away from Respondent's supermarket. The entrance to the supermarket itself is in the front west corner of the store. The sidewalk in front of the store is 15 feet deep. The store entrance is 15 feet wide; it opens into a sort of alcove or foyer and the inner door to the store is about 10 feet wide. The foyer contains a community bulletin board.

The only witness who offered specific testimony on the subject stated that the traffic flow on Ridge Road is heavy. At the time the disputed handbilling took place, over 100 cars per minute drove by the plaza entrance.

The evidence shows that until a few years ago, possibly until 1985, Respondent did not have a no-solicitation policy. At some point, a policy was adopted prohibiting solicitation except by political candidates during the traditional campaigning season.⁴ Respondent's asserted reasons for the partial no-solicitation policy are that it wishes to avoid annoying its customers and that it is concerned about possible liability.⁵ According to Respondent's witnesses, the policy provides that politicians or their supporters may campaign and distribute literature with prior permission.⁶ The candidates call and then give written confirmation to the main office which schedules their appearance at a supermarket for a certain date and time. Respondent permits up to two candidates

to campaign at a time, and each side may have two people appear on its behalf. Each appearance is limited to 2 hours' duration. Respondent instructs campaigners to hand literature only to departing customers and it prohibits the placement of literature under windshield wipers of cars parked in the lot.⁷ Although no specifics were placed in evidence, the testimony shows that in 1987 customers complained of an "over-zealous" candidate and that person was denied permission to campaign further. In 1988, Respondent denied permission to campaign to Lyndon LaRouche candidates because of a "virulent" approach to handing out literature. According to Respondent, it does not permit candidates to get up tables, to collect signatures, or to make speeches because there is too much customer traffic to permit those activities. Respondent denies permission to campaign for other than political elections; thus it has refused to permit campaigning for school-related elections.

Much of Respondent's evidence concerning the partial no-solicitation policy was given in general terms, that is, the corporatewide policy was set forth. Perhaps because most of Respondent's stores are freestanding and not in strip plazas, this testimony was limited to instances of campaigning in front of supermarkets. There was also testimony concerning the Wegmans supermarket at issue herein, that is, the store in Ridgemont Plaza. Two former assistant managers testified that on several occasions between 1986 and 1988, they prohibited certain solicitations from the front of the supermarket. Thus, a disabled person selling items, a school group selling candy and a veterans group selling poppies were told to leave and did leave from the front of the store. Again, this testimony related to the front of the Wegmans supermarket in Ridgemont Plaza. There was no evidence that other store owners and operators in Ridgemont Plaza similarly enforced a partial no-solicitation policy in front of their stores in Ridgemont Plaza. At least 1 and possibly 2 of the stores in the plaza are larger than the Wegmans supermarket, and there are a total of 29 stores in the plaza. There is no basis for concluding that these stores have any no-solicitation policy nor that Respondent requires them to have a no-solicitation policy nor that Respondent removes from the doorways or sidewalks of those stores any noncandidates who may be soliciting or handbilling patrons of those stores.

B. Handbilling by the Union

The Union has from 35,000 to 40,000 members according to Jay Bloom, its director of public relations.⁸ About 75 percent of these members are employed in the retail food industry, and the rest are in the health care and other service and manufacturing industries. The average wage in the retail food industry is \$5 per hour. Bloom testified that a few years ago, a union-represented food market went out of business in the Albany area, hurt by price cutting engaged in by a nonunion store. In the Elmira-Corning area of New York, a Wegmans store moved in and four or five organized stores went out of business and members of the Union lost their jobs. As a response to this loss of jobs by its members, the

³The record does not provide any details concerning the other stores.

⁴Although reference was made to a written policy, Respondent did not introduce it into evidence.

⁵Respondent did not explain the liability concerns.

⁶Testimony on this point was given by Elina Mavromatis, administrative assistant to the president of Respondent, and Brian Scanlon, director of loss prevention for Respondent.

⁷Respondent tells candidates that its customers are more receptive to political literature after they have completed their shopping; also, Respondent wishes to eliminate the possibility that literature will be discarded inside the store as litter.

⁸The Union represents employees in upstate New York, and parts of Pennsylvania, Vermont, and Massachusetts.

Union began the Organizing Defense Campaign in May, 1988. The purpose of the campaign is to promote greater job security for members of the Union through an informational program directed to the public and employees of nonunion employers. At first, the Organizing Defense Campaign was addressed primarily to the food industry, but it is gradually moving into other industries. Activities on behalf of the campaign have been undertaken in Buffalo, Utica, Albany, Syracuse, Ithaca, Corning, and Binghamton, New York. In Rochester, the Organizing Defense Campaign began in September 1988, with a press conference followed by handbilling at various locations.⁹

In some cities other than Rochester, the Union has sent mail directly to households with union members as part of its Organizing Defense Campaign. It has also conducted "telepicketing"; this activity involves calling telephone numbers and informing those who answer of the campaign. The union caller asks the person on the telephone to support the union by shopping in union stores. These types of activities require the Union to bear the cost of the worker performing the service, the cost of mail or telephone service, and the like. Union witnesses testified that these activities were halted or severely limited due to financial constraints. Similarly, media campaigns such as newspaper, radio, television, and bus advertising are judged too expensive and do not sufficiently target the audience.¹⁰

The handbillers are paid \$5 per hour by the Union. They are laid-off or retired union members or members of other unions. The instructions given to handbillers are that they should politely deliver the handbills to potential customers and ask them not to shop in the nonunion store but instead to please shop at the union stores listed on the reverse of the handbill. If an individual customer has a question, the handbillers are instructed to fetch the line captain; this is a person with training in union issues and in the Union's aim to protect the job security of members by getting consumers to shop at union stores. Bloom testified that the Union has no plans to organize nonunion chains such as Wegmans; because of their large size, the Union does not have the resources to organize their employees. Trade publications put the Wegmans share of the retail food market at 71 percent. The Union views Rochester consumers as hard to reach because there are so many Wegmans stores and only a few union stores.

On December 8, 1988, the Union engaged in handbilling at Ridgmont Plaza. Stephen E. Phelan, an organizer for the Union, testified that he and five other union employees went to the plaza about noon on that day.¹¹ Their purpose was to distribute two handbills. One handbill distributed that day bore a heading with the Union's name. It also said, "We're up front protecting union jobs." The central message, written in large letters stated, "Please don't shop Wegmans non-union." On the back of the handbill, was the message "Please shop union" and a listing of 14 upstate New York

union food chains and over 50 union independent food stores. The second handbill distributed on December 8, 1988, was headed "UFCW keeps pressure on Wegmans prices. Rochester grocery prices are coming down thanks to you." The three paragraphs of text stated that in September, union price checks showed that Wegmans prices were higher in Rochester than Syracuse and Buffalo but that the prices had been coming down as a result of complaints. Customers were urged to call Wegmans to complain about the cost of groceries. On the back of this handbill was a list of 33 items bought at Wegmans stores in four different locations showing that the total cost of the items purchased in the Rochester store was more than the cost at Wegmans in Buffalo, Syracuse and Henrietta.

Phelan was in charge, and he directed two of the union employees to stand at the end of the concrete median inside the plaza entrance just opposite Wegmans supermarket.¹² The two were about 5 feet off the edge of Ridge Road. They attempted to give handbills to occupants of cars entering and exiting the plaza. If a car stopped and the window was down, the handbillers would give the occupants the literature and ask them not to shop at Wegmans because it was a nonunion store. If they had time, they would also mention that union-conducted price checks of local food stores showed that the prices charged by Wegmans were higher than those at union stores in the area. Phelan testified that it took about 10 seconds to give out a handbill and deliver a verbal message.¹³ The two handbillers remained out near the highway for about 20 minutes. In that time, 60 to 70 cars entered the plaza from Ridge Road.¹⁴ About 15 of these cars stopped and received the handbills. Three times during the 20 minutes that the handbillers were at the plaza entrance, their activities slowed traffic to such an extent that a backup developed of three or four cars in the eastbound lane of Ridge Road. On each of these three occasions, Phelan told the handbillers to cease attempting to give out handbills and to let the traffic flow into the plaza. Phelan testified that it was unsafe to create backups into Ridge Road and that he was concerned that the police would intervene if the handbilling created a traffic jam.

After 20 minutes of observing the handbillers and their efforts at the plaza entrance, Phelan testified, he determined that handbilling at the position near the highway was ineffective. The handbillers did not know who was going to shop at Wegmans. As a result of his determination, Phelan and three other handbillers went to the front entrance of Wegmans supermarket and began handbilling. Two union employees stationed themselves on the sidewalk at the western corner of Wegmans near the store entrance and the other two stayed on the sidewalk near the eastern corner of the store. The union employees gave out the handbills and spoke to those customers who wanted to talk. During the 35 minutes that the handbilling was conducted near the store, about five shoppers per minute either entered or exited the store. About 200 handbills were distributed. It is undisputed that the four handbillers did not interfere with customer traffic to Wegmans and that no customers complained of any disturbance or inconvenience.

⁹In Rochester, the two nonunion chains targeted were Wegmans and Hagedorn's. Wegmans has a number of stores in the Rochester area.

¹⁰Respondent presented two witnesses to comment on the cost and effectiveness of media campaigns and handbilling in front of the supermarket. Neither of these witnesses had any expertise in labor campaigns nor were they familiar with the fact of the instant case. I shall not rely on their testimony.

¹¹Before becoming an employee of the Union, Phelan had a career in law enforcement.

¹²These two employees were wearing large bibs that said, in substance, do not shop at Wegmans because it is a nonunion store.

¹³The handbillers did not have time to ask the occupants of the cars where in the plaza they intended to shop.

¹⁴Phelan did not keep track of the number leaving the plaza.

After about 35 minutes during which the four handbillers remained in front of the supermarket, security personnel from Wegmans arrived on the scene. These were Scanlon, the director of loss prevention, Robert Hill, whose title does not appear in the record, and an unnamed camera operator. Hill told Phelan that he was on private property and Hill told Phelan to leave the plaza and conduct his activities near the roadway. According to Phelan, Hill told him that Wegmans owned the entire plaza, not just the supermarket, and Hill told Phelan that Wegmans was asserting its authority to require him to leave and take up a stand on public property. Phelan knew the Wegmans security men, having been arrested on two prior similar occasions at their behest, and on this occasion he left the Wegmans property rather than risk arrest.¹⁵ Since December 8, 1988, the Union has not returned to Ridgemont Plaza to handbill because it believes that it could not communicate effectively out at the highway.

Phelan testified that he did not use picket signs at Wegmans because the message he wanted to deliver was too long for one sign. The Union wanted to inform potential customers of Wegmans not only to avoid shopping at Wegmans but also to patronize certain unionized stores in the area. The Union also wanted to inform potential customers of Wegmans about the price checks and the purpose for conducting them. Phelan judged that these two messages could not be read from signs while making a turn off a 40-mile-per-hour highway.

Phelan also reached a judgment that handbilling at the entrance from Ridge Road was dangerous. He testified that on October 12, 1989, he went to Ridgemont Plaza and observed a young woman standing near the concrete median. A temporary stop sign had been placed there and as cars coming into the plaza stopped, the young woman asked the occupants if they were going to Wegmans and then she recorded their responses. The young woman told Phelan that she worked for Wegmans and that she felt safer at the cash register than at the plaza entrance.¹⁶ Phelan also testified that he could not station handbillers at the large, unmarked entrance to the plaza from the eastern-side road. Cars come from all directions there and it is too dangerous to stand in that location and try to stop cars in order to deliver a handbill and a message.

Phelan stated that there were about 5000 UFCW members in Rochester. He did not know the total number of organized employees there were in Rochester nor what percentage of the work force was organized.

C. Discussion and Conclusions

A discussion of the Union's right to handbill in front of Wegmans store must begin with the Board's decision in *Jean Country*, 291 NLRB 11 (1988). In that case, the Board considered whether nonemployed union agents could picket a

store located in a mall in order to inform the public that the employees of the store were not represented by a union. The Board summed up its approach to the issue as follows (at 14):

Accordingly, in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. [Denial of access will more likely be found unlawful when property is open to the general public than when a more private character has been maintained.]

The Board held that:

[t]he General Counsel bears the initial burden on the alternative means factor, i.e., that the General Counsel must show that without access to the property, those seeking to exercise the right in question have no reasonable means of communicating with the audience that exercise of that right entails. . . . This does not necessarily mean that, . . . the General Counsel must show that the party engaging in the Section 7 conduct actually attempted those means and found them futile. What is required is simply a clear showing, based on objective considerations, . . . that reasonably effective alternative means were unavailable in the circumstances. . . . We note however that, generally, it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact. [Id. at 13.]

The Board went on to explain:

Factors that may be relevant to assessing the weight of property rights include, but are not limited to, the use to which the property is put, the restrictions, if any, that are imposed on public access to the property, and the property's relative size and openness. . . . Factors that may be relevant to the consideration of a Section 7 right in any given case include, but are not limited to the nature of the right, the identity of the employer to which the right is directly related . . . , the relationship of the employer or other target to the property to which access is sought, the identity of the audience to which the communications concerning the Section 7 right are directed, and the manner in which the activity related to that right is carried out. Factors that may be relevant to the assessment of alternative means include, but are not limited to, the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and, most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message. [Ibid.]

Applying the *Jean Country* test to the facts herein, I find that although Respondent owns both the plaza and the supermarket, its private property rights do not weigh heavily. Ridgemont Plaza is open to the public and the public is in-

¹⁵There is some suggestion in the record, based on incidents at other Wegmans locations, that Respondent might not have objected to the Union's handbilling if it had been confined to the median near the highway. However, this was never clearly stated. Moreover, on the day that Respondent's agents ordered the union employees to leave the property, they clearly asserted a private property right to the entire plaza, not just the sidewalk in front of the supermarket, and they specifically told the union employees to take their activities out to public property. Thus, I shall base my findings on Respondent's demand that the union agents leave Ridgemont Plaza and cease handbilling on private property.

¹⁶Respondent did not introduce the results of this survey.

vited to park anywhere in the plaza in order to visit any of the 29 stores located there. There is no evidence that Respondent restricts solicitation in the plaza generally nor that it restricts solicitation in front of stores other than the Wegmans supermarket. And even in front of the Wegmans market, the ban on solicitation is only partial. Respondent permits campaigning by up to four people at a time on behalf of candidates on the ballot for public office. The campaigners approach Wegmans' customers, give them literature, and engage them in political discussions. It is self-evident that political campaigns often concern controversial issues which arouse the strong feelings of those subjected to the campaign messages. The facts thus do not support a claim by Respondent that it has a particularly compelling and strongly held property right in the instant case.

The right of the Union to inform the public that Wegmans supermarket is nonunion and to request that customers shop instead at a named union store is not considered a core Section 7 right, although it is protected by the Act. However, following the Board's test for determining the weight of the right asserted by the Union, I note that the right is directly asserted with respect to Wegmans as an employer of non-union employees, that Wegmans owns the store to which access is sought, that Wegmans customers are the audience addressed by the Union's campaign and that the Union engaged in peaceful nonobstructive handbilling. Thus, I conclude that while the Union's right is not at the core of Section 7 rights under the Act, it is relatively strong in the circumstances of the case.

Finally, in considering the availability of reasonably effective alternative means, I note that when the union agents were asked to leave Ridgemont Plaza they were specifically told that Respondent owns the entire plaza and that they must handbill only on public property. This would have required the union employees to stand on the sidewalk adjacent to one of the three plaza entrances. Standing at the easternmost entrance from the side road to the east of the plaza is not a reasonable means of distributing handbills and communicating with potential Wegmans customers. This entrance has no lane markings, and it would be dangerous to stand in front of it trying to stop cars coming from several directions at any given time. While the two entrances from Ridge Road each have a median divider, it is only marginally safer to stand there; the cars come off a 40-mile-per-hour road and turn into the plaza directly from the highway. Since traffic on Ridge Road is heavy, there is a tendency for cars to back up out into the roadway if one car stops while a handbill is being given out and a short message delivered. Although a picket sign might be visible, it would not be safe for the driver of a car turning into the plaza to stop and read the sign. Moreover, the Union wishes to direct potential customers of Wegmans to the nearby union food stores, and a list of these stores cannot readily be read from a picket sign.¹⁷ Further, if one is stationed at the entrance to the plaza, it is not possible to ascertain which cars contain potential customers of the Wegmans supermarket. The supermarket is the second or third largest store in a mall containing 29 stores; thus, the probabilities are that many people entering Ridgemont Plaza are not intending to shop at

Wegmans supermarket. Or, the people may be entering the mall to shop at other stores and might later decide to go to the supermarket on impulse; by then, they may have forgotten the Union's message and its request that they patronize supermarkets whose employees are union members. Respondent conducted a survey of cars entering the plaza from Ridge Road directly opposite the supermarket and it did not use this survey to show that most of the cars entering at that location were bound for the supermarket. Thus, if the Union is not permitted to handbill on the sidewalk in front of the supermarket itself, its message is substantially diluted, it risks enmeshing neutrals in the dispute, and it risks the safety of its own employees and that of the public.

I conclude that General Counsel has met the burden of showing that no reasonable means exists of communication with potential customers of the supermarket without access to the property. *W. S. Butterfield Theatres*, 292 NLRB 30 (1988), (picketing and handbilling near the entrance to the parking lot found to be ineffective and unsafe where cars turn into the lot from a four-lane street with a 35-mile-per-hour speed limit and potential patrons could not read picket signs from the theater entrance); *Target Stores*, 292 NLRB 933, 935 (1989) ("picketing at the main parking lot entrance was generally ineffective and dangerous owing to the difficulty of reading the picket signs under existing traffic speed and safety conditions. Handbilling at the main entrance also caused traffic congestion and was dangerous; the slow rate of distribution through windows to car occupants also hampered communication of the Union's message"; *Mountain Country Food Store*, 292 NLRB 967, 969 (1989) ("in view of the detailed nature of the Union's message in which it sought to persuade potential customers not to purchase Coca-Cola products bottled by the Employer, the information could not be fully contained on a picket sign").

Although Respondent suggests that the Union should be compelled to use a media campaign as well as certain direct mail and telephone methods to reach potential Wegmans customers, the Board has emphasized that it will find that a media campaign is a feasible alternative only in an "exceptional case." There is nothing in the record before me to indicate that the instant matter is an exceptional case. Respondent has not suggested any exceptional circumstances. Indeed, it would be difficult to make out an exceptional case where the property owner invites the general public onto its property and excludes solicitations in so incomplete and partial a manner as is demonstrated herein. Respondent has pointed out that as part of its overall Organizing Defense Campaign, the Union has sent mail to union households in certain areas of upstate New York, has conducted telephone drives to alert consumers to the campaign, and asked them to shop in unionized stores, and has distributed lawn signs in certain areas. These efforts were not undertaken in the Rochester area at issue herein. This circumstance does not create an exceptional case. The General Counsel's witnesses testified that direct mail, advertising, and telephone campaigns are expensive and diffused and that giving out handbills is cheap and effective. Respondent attempted during the hearing to develop information relating to the amount of money in the union treasury so that it could show that the Union could afford a media campaign or the like in Rochester. This attempt by Respondent must be emphatically rejected. If Respondent's tactics reduced the instant case to a subjective analysis

¹⁷ Nor could picket signs be read by customers standing in front of the supermarket itself; the nearest public sidewalk would be about 600 feet away.

of the Union's relative ability to pay, then the Board's decisional processes would be invoked to tell the Union in what manner and to what degree of expense the Union should undertake to achieve its aims. This interference in the internal affairs of a union was never contemplated by the Act.

Respondent relies on the Board's decision in *Red Food Stores*, 296 NLRB 450 (1989). In that case, three locations were picketed and handbilled by the union. The locations were a free-standing store and two stores in very small strip malls containing six and nine stores, respectively. After the owners obtained a state court injunction barring picketing in front of the stores, the union continued picketing and handbilling on the public perimeter areas surrounding the parking lots. The Board found that the private property right was strong; there was no evidence of solicitation by other individuals or entities. The Board further found that General Counsel had not met the burden of showing that the alternatives actually employed by the union were not effective. In *Red Food Stores*, the union had actually picketed the stores for 3 months at perimeter locations. The evidence did not show that customers in front of the stores or entering the parking lots could not read the picket signs. There was no risk of dilution of the union's message or of enmeshing neutrals because of the small size of the strip malls. The Board specifically distinguished its findings in *Jean Country* where there were longer distances to the stores from the parking lot entrances and more stores and more customers on the premises. The Board also found that the union in *Red Food Stores* had actually conducted a media campaign while the picketing and handbilling were going on. The Board emphasized that although it would be "reluctant to impose the cost of a media campaign on a union, the Union here in fact utilized a media campaign and the circumstances of this case do not persuade us that the commercials here, considered in conjunction with the picketing and handbilling at the perimeters of the stores, were not an effective alternative means." The Board discussed a respondent's contention that a union should undertake a newspaper, direct mail, and neighborhood campaign in *Sentry Markets*, 296 NLRB 40 (1989). In that case, where many of the facts regarding the traffic conditions surrounding the shopping mall were similar to the facts herein, the Board noted that no exceptional case warranting the conducting of a media campaign had been made out. The Board found that the alternatives suggested by the respondent "would not be reasonable alternatives here because they would move the Union's message too far in time and distance from the point of purchase." (Id. at 43.) The Board also observed that handbilling exiting cars was not effective because at that point the customers had already made their purchases.

The facts in the instant case are more like those in *Jean Country* than those in *Red Food Stores*. The facts show that it is unsafe to handbill on the perimeter entrances of Ridgemont Plaza, customers at the stores are far from any message delivered at the perimeter, there are many stores at the Ridgemont Plaza thus increasing the dilution of the Union's message and the likelihood of enmeshing neutrals, certain types of solicitation are permitted in front of the supermarket and there is no evidence that solicitation is prohibited elsewhere in the mall, and the Union has not in fact actually carried on a media campaign in the Rochester area.

In summary, I find that the Section 7 right at issue herein would be substantially impaired if access to the Wegmans supermarket were denied in view of the lack of a reasonably effective alternative of reaching the intended audience for the Union's message. I find that the degree of impairment of Respondent's property right is slight given the facts relating to public access to Ridgemont Plaza and the sidewalk in front of Wegmans supermarket. I conclude that the balance referred to in *Jean Country* tips in favor of granting access to the Union. Thus Respondent violated Section 8(a)(1) of the Act by denying access to the Union to distribute handbills in front of the Wegmans supermarket in Ridgemont Plaza.

The General Counsel also argues that Respondent applied its no solicitation rule in a disparate manner. The facts show that Respondent regularly permits up to four campaigners at a time to handbill and solicit support for political candidates on the sidewalk in front of its supermarket. Further, there is no evidence that there is any no-solicitation rule applicable to Ridgemont Plaza as a whole as distinct from the area immediately surrounding the supermarket. In the instant case, the Union sought to have four of its employees distribute handbills on the sidewalk in front of the supermarket. It is undisputed that these activities did not cause any inconvenience or disturbance during the time they continued on December 8, 1988. Respondent has suggested no rationale to support the granting of access to political candidates while prohibiting access to representatives of the Union. I conclude that Respondent's denial of access to the Union to handbill on the sidewalk in front of its supermarket constitutes unlawful disparate treatment of union activities in violation of Section 8(a)(1) of the Act. *D'Alessandro's, Inc.*, 292 NLRB 81 (1988); *Ordman's Park & Shop*, 292 NLRB 953 (1989).

CONCLUSION OF LAW

By prohibiting representatives of United Food and Commercial Workers District Union Local One, AFL-CIO from distributing handbills on the sidewalk in front of Respondent's store in Ridgemont Plaza in order to advise the public that Respondent's store is nonunion and to request the public to shop at unionized stores, and by enforcing its partial no solicitation policy in a disparate manner, Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The Respondent, Wegmans Food Markets, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Prohibiting representatives of United Food and Commercial Workers District Union Local One, AFL-CIO from

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

engaging in handbilling in front of Wegmans supermarket in Ridgemont Plaza, Greece, New York, in order to inform the public that Wegmans is nonunion and to request the public to shop at unionized stores.

(b) Enforcing its partial no-solicitation rule in a disparate manner against the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its supermarket in Ridgemont Plaza in Greece, New York, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of United Food and Commercial Workers District Union Local One, AFL-CIO from engaging in handbilling in front of Wegmans supermarket in Ridgemont Plaza, Greece, New York, in order to inform the public that Wegmans is nonunion and to request the public to shop at unionized stores.

WE WILL NOT enforce our partial no solicitation rule in a disparate manner against the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WEGMANS FOOD MARKETS, INC.